Workers' Compensation and Product Liability: The Interaction of a Tort and a Non-Tort Regime

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I. INTRODUCTION

Although tort litigation produces only a small fraction of the total compensation secured by the victims of disabling injuries,[1] the system of tort liability is the background legal regime within which all other compensation schemes must function. The victim of a new kind of injury is always entitled to come to court and appeal to the basic principle of fault—in a product ("defective"), vessel ("unseaworthy"), or person ("negligent")—as the predicate for a novel cause of action. However sizable may be the funds expended through an administrative no-fault program such as workers' compensation (WC), from a legal perspective the latter is an island in the broader sea of tort.

One consequence of WC's status is that the tort system is still available in principle even to victims who have been able to satisfy the precondition for entitlement to such administrative compensation. Thus, a perennial problem of legal design concerns the appropriate relationship between tort and non-tort liability in situations where both are potentially applicable to the same injury. The solution to that problem must take account of the interests of at least three parties: the injured victim (*e.g.*, the employee), the party with whom the victim has the kind of direct relationship that entails the provision of guaranteed non-tort compensation (*e.g.*, the employer), and the third party which may be responsible under tort law (*e.g.*, a product manufacturer).

WC is not the only no-fault system to present this problem of legal design. The equally substantial program of veterans' benefits provided by the federal government for service-related injuries has engendered the same set of questions about how to deal with the tort liability of outside contributors to service injuries—most prominently in the recent Agent Orange litigation.[2] The same problem must be faced if and when the no-fault concept expands its reach over medical accidents from its current

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1. O'Connell and Barker calculate that, in 1982, benefits paid due to tort liability for injury and illness totalled $31 billion of the total $350 billion paid by all the principal loss-shifting systems. O'Connell & Barker, *Compensation for Injury and Illness: An Update of the Conard-Morgan Tabulations*, 47 OHIO ST. L.J. 913, 924 (1986). Of that tort liability share, two-thirds ($22 billion) was from automobile liability insurance. *Id.*

2. For a discussion of recent Agent Orange litigation, see P. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS (enlarged ed. 1987). Schuck examines in some detail the liability of the general contractors for injuries caused by the chemicals they supplied to the U.S. Government. *Id.* at 81–82, 307–12. Schuck also examines the immunity of the federal government vis-à-vis both veterans and contractors, for the harmful effects of the products that the government had ordered and used. *Id.* at 245–52.

narrow foothold in catastrophic obstetrical injuries occurring in Virginia and Florida.[3] In this article, I shall explore these issues in detail with respect to workplace injuries involving defective products. This setting has been the source of both the most extensive experience with and the greatest felt urgency about this problem. However, at the end of the article I shall speculate about how this WC experience and debate might be utilized in the design of a no-fault program for medical accidents, obstetrical or otherwise.

II. The Elements of the WC No-Fault Model

The key elements of the no-fault model, as exemplified by WC, are as follows:[4]

1. *Insurance.* A WC statute requires employers to secure and provide insurance for their employees against the losses suffered by reason of workplace injuries. Such insurance must come either from approved carriers or from the employer's own resources for self-insurance, as certified by a state agency.

2. *Entitlement.* Unlike the tort system, in which recovery against the employer (and its liability insurer) depends upon proof of both the employer's *fault* (and also the absence of worker fault), the injured employee may draw upon WC insurance if the injury was in any way *caused* by the job—*i.e.*, if it "arose out of and in the course of employment."

3. *Benefits.* While a WC regime expands the basis of employer responsibility to encompass all job-related injuries, it reduces correspondingly the extent of the employer's legal responsibility for any particular injury. Rather than award full tort compensation for all economic and noneconomic losses suffered by each victim, the typical WC benefit scheme reimburses the victim for all medical costs and the bulk of net wages lost due to temporary disabilities (up to a ceiling set at or above the average earnings level). Most WC programs also include a scheduled benefit for permanent disabilities, which is designed to compensate the worker for either the physical impairment itself or the consequent loss of earning capacity.

4. *Administration.* Primary responsibility for administering a WC scheme is conferred upon an administrative tribunal: the expectation is that this process will give workers quicker, easier, and less expensive access to the above benefit structure. Ideally, such ready access is also facilitated by substituting "cause" for "fault" as the precondition for recovery, and by replacing at-large damages tailored to each victim with the schedule formula designed for the average worker.

5. *Exclusivity.* The tacit assumption of the no-fault model is that victims as a group are better protected, *ex ante*, by such a guarantee of more limited redress for crucial financial losses from workplace injuries, even granting that in particular

3. For a description of the background to and the design of the no-fault plan that Virginia enacted in 1987 and Florida adopted in 1988, see Note, *Innovative No-Fault Tort Reform for an Endangered Specialty*, 74 VA. L. REV. 1487 (1988).

4. I have analyzed in detail the policy debates about the operation of WC in P. Weiler, Legal Policy for Workplace Injuries (ALI Working Paper, 1986) (on file with the Ohio State Law Journal). The standard reference for the legal principles of the WC program is Arthur Larson's multi-volume treatise on WC law. I shall cite Larson's abridged two-volume desk edition, A. LARSON, WORKMEN'S COMPENSATION FOR OCCUPATIONAL INJURIES AND DEATH (desk ed. 1988) (regularly updated with cumulative supplements), throughout this article.

cases, viewed *ex post*, the individual worker who can establish fault would likely be able to collect more substantial tort compensation for all the economic and noneconomic consequences of the injury. Having made such an assumption and required the employer to provide and pay for this preferred WC system, the legislature then grants employers the *quid pro quo* of statutory immunity from any liability for these workplace injuries under the background tort system.[5]

III. The Return of Tort Litigation to the Workplace

Although still the subject of some controversy among historians,[6] it is at least plausible to conclude that the initial exchange of possible but extensive tort damages for the guarantee of limited WC benefits was a good deal for workers generally. Certainly, legal doctrines prevailing in the nineteenth century made the tort system notably inhospitable to injured workers. By the turn of the century, both federal and state legislatures had begun to enact employer liability laws that removed one or more of the "unholy trinity" of employer defenses—the fellow servant rule, voluntary assumption of risk, and contributory negligence. However, the tort system was still not accessible in practice to many injured workers who did not have the personal resources required to pay for legal services, and whose damage claims might not seem sizable enough to produce a contingent fee sufficient for the risk-bearing attorney. The other side of the coin was that WC offered expeditious medical care and income replacement for the readily visible categories of accidental injuries initially covered by WC. These benefits were indispensable to the injured worker and his family, because little private or public loss insurance was then available against such mishaps.

Now, however, the balance between tort and WC looks quite different, as evidenced by the recent surge in tort litigation over job-related injuries, particularly lawsuits against suppliers of products which contributed in one way or another to such injury incidents. Actually, the workplace has always been the source of some of the key precedent-setting decisions concerning product liability.[7] However, systematic federal studies of the first "crisis" in product litigation and insurance costs in the mid-seventies disclosed that employee suits were a major contributor to these phenomena.[8] While only slightly over ten percent of product liability claims are

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5. Explicit corroboration of this *quid pro quo* can be found in the three jurisdictions—New Jersey, South Carolina, and Texas—that still make WC elective on the part of both employer and employee. A. Larson, *supra* note 4, at § 67.10. In those states, if the employer chooses not to provide WC insurance and participate in the program, the employer does not enjoy any immunity from tort suits by its employees. Indeed, even in jurisdictions where WC is legally mandatory, if an individual employer has ignored its legal obligation to purchase WC insurance or to have its self-insuring capacity certified, the employer is exposed to litigation for such injuries. *Id.*

6. *See* Croyle, *Industrial Accident Liability Policy of the Early Twentieth Century*, 7 J. Legal Stud. 279, 280 (1978); Friedman, *Civil Wrongs: Personal Injury Law in the Late Nineteenth Century*, 1987 Am. B. Found. Res. J. 351; *cf.* Friedman & Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 Colum. L. Rev. 50, 65–66 (1967).

7. *See, e.g.*, Winterbottom v. Wright, 152 Eng. Rep. 402 (Exch. of Pleas 1842); Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978); Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944); Beshada v. Johns Manville Prod. Corp., 90 N.J. 191, 447 A.2d 539 (1982). *See also* R. Epstein, C. Gregory & H. Kalven, Cases and Materials on Torts 637–740 (4th ed. 1984) (includes seven decisions involving workplace injuries in the fifteen major cases used in its chapter on product liability).

8. This fact emerged from two closed claims surveys done for the federal government in its reviews of workers'

brought by injured workers, these cases tend to be among the more serious and costly ones (WC being available and generally sufficient for less serious employee injuries), and thus they absorb more than forty percent of total product liability payments.[9] The studies from the seventies reflected primarily the surge in litigation over machine tools and other equipment involved in workplace accidents. Since the path-breaking *Borel* decision in 1973,[10] we have witnessed an explosion of tort claims involving industrial diseases, particularly diseases resulting from exposure to asbestos. Employee suits, therefore, likely constitute an even larger share of the much higher volume of product litigation and insurance premiums in the liability crisis of the mid-eighties.

It is not hard to fathom why individual workers have developed such an increased propensity to bring tort suits rather than simply to rely on guaranteed WC benefits. This phenomenon is the product of recent trends that have made WC less valuable and tort liability (especially, though not exclusively, for defective products) much more valuable.

The WC system gradually ceased to be the sole source of funds to provide the immediate medical care and income necessary to the injured worker and his family. Such funds are now available from a variety of private and public systems of general loss insurance that are typically provided, and at least partially paid for, by the same employer that finances the WC insurance. At the same time as the source of funds was shifting away from WC, the eventual payoff from WC for more serious and enduring injuries was being seriously eroded. The rigid permanent disability schedules appeared increasingly arbitrary in particular cases, and periodic benefit payments were not regularly adjusted to rising price levels experienced from the late sixties onward. In the new class of industrial disease cases which became prominent in the early seventies—especially long-latency, non-signature diseases such as lung cancer, which were then being attributed to toxic exposure in the workplace — even these relatively niggardly WC benefits could be obtained only with great difficulty, after long delays, and by using expensive legal services.[11]

Meanwhile, contrasting trends were making potential tort claims much more valuable in their own right, not only in comparison with WC. The basis of tort liability was being substantially extended. One key legal event in this connection was the development of strict liability for manufacturing defects in products (actually, the

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compensation and product liability. The first survey, covering workers' compensation claims in 1974, was prepared for the Department of Labor's Interagency Task Force on Workers' Compensation and is reported in Bernstein, *Third Party Claims in Workers' Compensation: A Proposal to Do More With Less*, 1977 WASH. U. L.Q. 543, 562–64. The second survey, covering product liability claims from mid-1976 into early 1977, was prepared for the Department of Commerce's Interagency Task Force on Product Liability, and its results are reported in Weisgall, *Product Liability in the Workplace: The Effect of Workers' Compensation on the Rights and Liabilities of Third Parties*, 1977 WIS. L. REV. 1035, 1038–39, and in Viscusi, *The Interaction Between Product Liability and Workers' Compensation as* Ex Post *Remedies for Workplace Injuries*, 5 J. L. ECON. & ORGANIZATION 185, 188–95 (1989).

9. *See* Bernstein, *supra* note 8, at 562–64; Weisgall, *supra* note 8, at 1038–39.

10. In Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974), the Fifth Circuit upheld the first jury verdict for a worker who had developed cancer as a result of exposure to asbestos on the job. *Borel* and its progeny are the subject of P. BRODEUR, OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL (1985). The title of this book accurately conveys its point of view.

11. These problems within WC and alternative responses to them are discussed in P. Weiler, *supra* note 4.

substitution of product fault for producer fault). A more subtle but even more significant development was the emergence of a new judicial attitude toward what one might label the "conscripted samaritan": the use of tort law to force one actor (*e.g.*, a manufacturer) to adopt measures to protect a potential victim (*e.g.*, a worker) from the misdeeds of a third party (*e.g.*, an employer) or even from the foolhardiness of the victim himself.[12] This theme began to appear in a variety of tort contexts in the early seventies. For example, courts began imposing responsibility on landlords and hotel owners for crimes and torts committed on or near their premises, and on commercial or even social hosts for the subsequent behavior of people to whom they had served alcohol. In the product liability context, this theme resonated especially in a broadening concept of "defect," which required manufacturers to take elaborate steps either to warn against or, ideally, to design foolproof safeguards against hazardous misuse of their equipment by employers or workers.

Later I shall offer several illustrations of this new judicial attitude toward the conscripted samaritan in connection with the issue of how such tort responsibility should be shared between manufacturer and employer. This part concludes simply by mentioning two other nondoctrinal factors that have contributed greatly to the readiness and ability of injured workers to take advantage of and to press even further the expanding boundaries of tort liability.

One factor is the dramatic expansion of the scope of liability and potential damages which has resulted from the use of more sophisticated techniques for estimating future economic losses, as well as the ability of plaintiffs to elicit from juries increasingly generous monetary awards to make up for pain and suffering and other non-financial consequences of bodily injuries. The other factor is the emergence of a more talented, experienced, and resourceful personal injury bar to serve this growing clientele for legal services in a market financed by the generous contingent fees that are readily available in this hospitable legal environment.

The impact of the contrasting trends in WC on the one hand and the tort system on the other is graphically displayed in the following figures: in the mid-seventies, 120,000 permanently disabled workers recovered average WC benefits of slightly over $4000 apiece, for total WC payments of half a billion dollars;[13] but 30,000 of these disabled workers who were able to bring successful tort claims collected on average nearly $40,000 each, for a total tort payout of about $1.2 billion.[14] And remember that these figures predate the explosion of asbestos and other industrial disease litigation.[15]

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12. Another label used to characterize this judicial sentiment is "negligent security." *See* Zacharias, *The Politics of Tort*, 95 YALE L.J. 698 (1986). Zacharias defines the term as the tort liability imposed upon a variety of enterprises for failing to take adequate measures to prevent injuries actually inflicted by the wrongful behavior of third parties. *Id.* Perhaps the key decision sparking this trend was Kline v. 1500 Massachusetts Ave. Apartment Corp., 439 F.2d 477 (D.C. Cir. 1970), which held a landlord liable to its tenant for injuries suffered from an assault and robbery in a hallway of the apartment building.

13. *See* Bernstein, *supra* note 8.

14. *Id.*

15. A detailed empirical study of a cohort of insulation workers found that the group, as a whole, recouped 36 percent of their overall economic losses from all sources of disability benefits. Johnson & Heler, *Compensation for Death from Asbestos*, 37 INDUS. & LAB. REL. REV. 529 (1984). Of these sources, tort liability contributed 16 percent versus 28

IV. The Scope of Employer Immunity

Not surprisingly, the empirical and attitudinal shifts discussed in Part III were associated with corresponding trends in legal doctrine. The main focus of this article is on the relationship of third-party tort litigation and the employer's immunity from tort liability under WC legislation. But it is useful first to review the nature of this employer immunity and the pressures that have been placed on the WC exclusivity doctrine by the growing appeal of the tort system.[16]

The core of the legislative policy underlying WC is to grant employers immunity from employee lawsuits over workplace injuries on the ground that the employer has been required instead to provide WC benefits. But the legal expression of that policy uses a number of key terms such as *employer, employee*, and *injury*, which must themselves be defined and interpreted. Each of these terms has been the subject of much judicial action and legislative reaction over the last couple of decades.

To begin with the concept of *employer*, a minority of jurisdictions (ten states) still grant tort immunity only to the worker's immediate legal employer: the party that furnished the WC insurance for the injury.[17] In these systems, the worker is legally entitled to sue any fellow employee in the firm whose personal carelessness may have contributed to his injury. Of course, most ordinary workers do not have the assets necessary to satisfy the kind of sizable tort judgment (over and above WC benefits) that would make it worthwhile for the employee (and his lawyer) to bring a suit in the first place. But such practical insulation from being sued need not hold true for senior officials and perhaps even major shareholders of the corporate employer. The exposure of these "employees" to tort damages for the untoward results of their decisions means that the firm will likely have to provide them with liability insurance against the possibility of any such lawsuit. The cost of such liability insurance will be over and above the premiums for the WC insurance that the firm carries for its employees generally. For these and other reasons, the vast majority of jurisdictions now extend the employer's tort immunity against the worker to cover the latter's co-employees as well.[18]

The same process of judicial probing and legislative response has taken place with regard to the WC insurance carrier.[19] Such insurers often not only provide financial coverage and claims administration, but also take a more active role in the rehabilitation and prevention of job-related injuries. But given the current aggressive tort atmosphere, any party that undertakes such responsibility likely runs the risk of liability if the employee injuries fail to be properly prevented or healed. If the harm

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percent from WC, 29 percent from SSDI, and 24 percent from private pensions. *Id.* at 532. However, the small number of successful tort claimants recouped a substantially larger share of their losses. *Id.* at 536. A similar study of a different group of asbestos workers arrived at comparable findings. *See* Spatz, *Issues in Asbestos Disease Compensation*, in Current Issues in Workers' Compensation 287 (J. Chelius ed. 1986).

16. For a detailed description of the legislative and judicial treatment of employer immunity under WC, see A. Larson, *supra* note 4, at §§ 65–70.

17. *Id.* at § 72.11.

18. *Id.* at § 72.21.

19. *Id.* at § 72.90. One of the best judicial debates about this issue is found in Nelson v. Union Wire Rope Corp., 31 Ill. 2d 69, 199 N.E.2d 769 (1964).

results from some failure of the employer, the employer would not be liable for tort damages; but if the harm is attributable to the failings of the insurance carrier, the carrier will have to pay. Of course, it will not be insurers who ultimately pay for the cost of these damage awards. This additional legal risk of WC liability simply will be included in the insurer's costs that must be paid by the employer's premiums. Again, the result is that a large majority (19 out of 26) of the jurisdictions whose courts or legislatures have addressed the question of insurance carrier liability have decided to shelter the carrier under the employer's immunity.[20]

An analogous difficulty arises with respect to the concept of the *employee* whose tort rights are displaced: how should the courts treat lawsuits by the spouse, children, parents, and other relatives and friends of the injured worker? The recent expansion of tort liability has included the development and the revival of a host of "relational" torts to compensate for the loss of consortium and support or the infliction of emotional distress upon those who have some attachment to the immediate victim, while few if any of these injuries are redressed under a WC program. On the other hand, an employer that is financing a general system of direct no-fault compensation for all its injured workers strongly objects to any exposure to what may be six- or seven-figure damage awards paid to the employee's family members, awards from which the injured worker will inevitably draw some financial support as well. With few exceptions, American legislatures have sided with the employer on this issue and now extend the ban on employee tort suits to encompass the worker's family as well.[21]

A somewhat more tangled and contentious issue concerns the kinds of *injuries* and the kinds of *conduct* that are protected from suit by the exclusivity doctrine. The historic focus of WC has been to require the employer to compensate its employees for the economic consequences of disabling injuries produced by workplace accidents (and, more recently, industrial diseases). In light of this limited affirmative role for WC, courts have placed roughly corresponding limits on the statutory restriction of employer tort liability.

Dignitary Injuries. There has long existed a number of nominate torts that protect people against invasion of their non-physical interests: examples of these are false imprisonment (for loss of freedom) and defamation (for damage to reputation).

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20. *See* A. LARSON, *supra* note 4, at § 72.91. An interesting variant on this same problem stems from the fact that trade unions as well as insurance carriers have become interested and involved in injury prevention in the workplace. Indeed, it is generally considered a desirable innovation in collective bargaining for the union to negotiate contract provisions that give its members and officials some role to play in monitoring and reducing hazardous conditions and practices on the job. But the general tort trend towards "conscripting samaritans" exposed unions to a growing risk of liability for their failure to perform that safety role effectively once they apparently had assumed some contractual responsibility for it. This trend might have been dealt with by simply treating the union and its treasury as an organization of the fellow employees of the worker, and thereby entitling the union to the same immunity as such co-employees. Because state courts largely ignored that option, the U.S. Supreme Court recently put an end to this entire development by finding such state tort liability to be pre-empted by federal labor laws. *See* International Bhd. of Elec. Workers v. Hechler, 481 U.S. 851 (1987).

21. *See* A. LARSON, *supra* note 4, at § 66.20. *See also* Ferriter v. Daniel O'Connell's Sons, Inc., 381 Mass. 507, 413 N.E.2d 690 (1980) (displaying a number of the tort actions which can be devised on behalf of family members to elude the employer's WC immunity in jurisdictions like Massachusetts which still restrict immunity to suits brought by the injured worker himself).

Courts consistently have assumed that legislatures intended no employer immunity from this kind of tort action, nor from the more recent generic legal protection against severe emotional distress produced by outrageous employer behavior. Indeed, the employee's statutory entitlement to collect WC benefits has itself been a significant progenitor of a flourishing new tort of wrongful dismissal. Under the doctrine of wrongful dismissal, employees now regularly obtain substantial damages if they are fired in retaliation for exercising their rights under WC or other public programs and policies. Needless to say, the employer's immunity from suit does not preclude a tort action on such grounds.

Intentional Misconduct. Even with respect to physical injuries to the worker, courts have read another tacit limitation into the exclusivity provision. Suppose that an employee is severely hurt on account of a deliberate assault by his employer. Any judge naturally would be loathe to assume that a legislature intended that the employer's liability be confined to WC benefits (which, in the case of a deceased worker with no dependents, might amount to no more than meager funeral expenses). Courts have uniformly avoided this result by returning to the historic WC definition of disabling injury as one produced by "accident," and thence inferring that WC immunity will not protect the employer from tort suits for *intentional* misconduct.[22] Interestingly, the injured employee is still entitled to collect WC benefits in such cases, because whatever the motivation underlying the employer's behavior, the resulting injury is still accidental from the employee's perspective.

This judicial treatment of a disabling injury as one produced by "accident" is highly appealing when applied to the example of an intentional assault committed by the person who owns the business and employs the injured worker.[23] Suppose, however, that the assault is launched by a fellow worker who is likely judgment-proof, and the disabled employee tries to collect his damages from their common corporate employer. Moral qualms about the exclusivity doctrine do not seem applicable here, because this workplace altercation and injury will be considered an unfortunate accident from the point of view of the employer (and its shareholders), as well as from the victim's perspective. By and large, then, courts have concluded that the exclusivity doctrine does protect employers from vicarious liability for the intentional misdeeds of fellow employees.

Suppose, on the other hand, that the employee has traced his physical injury to a corporate policy deliberately adopted by senior officials of the firm—such as the use of potentially toxic chemicals in the plant—and that this policy carries with it a significant risk of injury to the employees that the firm has decided to incur. While courts in almost all jurisdictions have firmly confined this exception to the exclusivity doctrine to injuries which were *purposeful*, a few state courts—notably in Ohio, West Virginia, and North Carolina—have flirted with the broader connotations of deliberate and reckless behavior. This approach, which would have threatened major

22. *See* A. LARSON, *supra* note 4, at § 68.10.

23. *See* Doney v. Tambouratgis, 73 Cal. App. 3d 430, 140 Cal. Rptr. 782 (1977) (sexual assault on topless dancer by her employer, the owner of the bar); Schutt v. Lado, 138 Mich. App. 433, 360 N.W.2d 214 (1984) (false imprisonment, assault, and battery of employee by her doctor/employer in latter's office).

inroads on employer immunity, particularly in connection with industrial disease, has been reversed or at least attenuated by subsequent legislation or judicial action in those jurisdictions.[24]

A much greater threat to employer immunity was posed by the judicial development in several jurisdictions of the *dual capacity* doctrine.[25] This theory implies that the firm could rightfully claim immunity only for torts committed in its capacity as *employer*, but that such immunity should not be extended to torts committed by the firm in another capacity, for example, as the *manufacturer* of a product or as the *provider* of medical services that either inflict or aggravate injuries to the employee.

The distinction implied in the dual capacity doctrine does have to be drawn at least for the following type of case. Suppose that the employee of an auto maker, who buys for his personal use a car manufactured by the employer, is injured in an accident caused by a defect in the car while out for a Sunday drive. Alternatively, suppose that a nurse employed by a hospital suffers injuries due to negligent treatment while she is having her baby delivered in that hospital. In neither case should there be any immunity from a tort suit brought by the victim of the non-work-related injury merely because the defendant coincidentally happens to be the employer of the victim. The crucial extension of this position occurs when the employee drives the defective car while on the job for the auto maker,[26] or the negligent medical services are provided by the hospital in treating the nurse for an initial injury suffered on the job.[27] Courts which have applied the dual capacity exception in these cases reason that if the employees had been members of the general public injured in the same fashion, they would have been able to bring a product liability or medical malpractice action. Thus, it would be unfair to deprive them of their normal tort rights simply because WC has historically denied them the right to sue for specifically employment-related torts.

There are, however, two problems with such logic. First, if the dual capacity doctrine were to be extended generally in this way, it would open up vast possibilities for tort litigation against employers who could readily be cast as defendants under a host of different labels used in tort cases and texts: as manufacturer, installer, or repairer of products; as owner and/or occupier of land, vehicle, or vessel; as hospital

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24. *See, e.g.*, Mandolidis v. Elkins Indus., Inc., 161 W. Va. 695, 246 S.E.2d 907 (1978) (case largely reversed by West Virginia legislation in 1983); Pleasant v. Johnson, 312 N.C. 710, 325 S.E.2d 244 (1985). The broadened concept of intention used by the North Carolina court in *Pleasant* to allow a suit against an otherwise immune fellow employee was not applied in a suit brought against the employer itself. *See* Barrino v. Radiator Specialty Co., 315 N.C. 500, 340 S.E.2d 295 (1986). The trend-setting cases in Ohio were Blankenship v. Cincinnati Milacron Chem., Inc., 69 Ohio St. 2d 608, 433 N.E.2d 572 (1982), *cert. denied*, 459 U.S. 857 (1982), and Jones v. VIP Dev. Co., 15 Ohio St. 3d 90, 472 N.E.2d 1046 (1984). In 1986, the Ohio legislature enacted legislation to redefine the concept of "intention" and to cut back on the implications of these judicial precedents. *See* OHIO REV. CODE ANN. § 4121.80 (Anderson 1986). In a set of decisions handed down in April of 1988, the Supreme Court of Ohio first held that this legislation was inapplicable to employee tort claims pending as of its 1986 enactment but later reinterpreted its own precedents along similarly narrowed lines. *See, e.g.*, Kunkler v. Goodyear Tire & Rubber Co., 36 Ohio St. 3d 135, 138–39, 522 N.E.2d 477, 480–81 (1988).

25. *See* A. LARSON, *supra* note 4, at § 72.81. *See generally id.* at §§ 72.80–.86.

26. *See* Mercer v. Uniroyal, Inc., 49 Ohio App. 2d 279, 361 N.E.2d 492 (1976) (holding a tire manufacturer liable to its employee injured when the truck he was driving went out of control due to the blowout of a tire manufactured by that same employer).

27. *See* Duprey v. Shane, 39 Cal. 2d 781, 249 P.2d 8 (1952) (holding that a chiropractor was liable to his employee for negligent treatment which aggravated injuries originally suffered by the employee while on the job).

or health care provider; as self-insurer or safety inspector; as vendor or bailor; and so on. Second, such an erosion of tort immunity in these cases would ignore the fact that these employee injuries, initial or aggravated, did arise out of and in the course of employment, and thus would entitle the injured employee to WC benefits even if there had been no defect in the vehicle or no negligence in the medical treatment. This situation is quite unlike the situation of members of the general public—including employees injured in the course of their personal lives—whose only source of compensation would be the tort system. Again, most state courts have held the line against such use of the dual capacity notion, and the legislatures in other jurisdictions (*e.g.*, California, though not Ohio) have reversed their earlier judicial pioneers of the theory.[28]

There are several lessons to be drawn from this quick sketch of the past and present state of employer immunity from direct tort actions by injured employees.

1. The interpretation and elaboration of the apparently simple policy of WC exclusivity does pose a number of complex legal questions, thus inviting a variety of imaginative extensions and limitations of the policy.

2. When the pressures for tort litigation built up in the late sixties to supplement inadequate levels of WC benefits, judges in many jurisdictions naturally were responsive to the plight of injured plaintiffs and the inventiveness of their lawyers. Numerous courts, therefore, adopted a variety of techniques by which an employee and his family could secure tort recovery from the employer.

3. By the late eighties, almost all the loopholes to the exclusivity doctrine had been closed either by judicial rethinking or legislative reversal. As a result, to the extent that the employer is now required to provide and finance guaranteed WC benefits for the kinds of injuries that come within the framework of the no-fault program of WC, the employer is now well protected from having to obtain and pay for liability insurance—not only for itself, but for its employees and its WC insurance carrier as well—against the risk of any tort suit arising out of the same injuries.

V. The Challenge of Third-Party Liability

Regardless of how far one stretches the protective umbrella of the WC exclusivity provision vis-à-vis employers, this provision ultimately leaves open the possibility of tort action by injured workers against outside third parties involved in accidents. For example, if a truck driver is injured in a highway collision with a vehicle which is carelessly operated by another driver, the employee's tort rights against this other driver are unimpaired by the WC system. Because such outside parties play no role in providing WC benefits, they can claim no reciprocal protection against tort suits.

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28. For emphatic rejection of the dual capacity doctrine in the products liability context, see, *e.g.*, Longever v. Revere Copper and Brass, Inc., 381 Mass. 221, 408 N.E.2d 857 (1980); Kaess v. Armstrong Cork Co., 403 N.W.2d 643 (Minn. 1987). Although California judges had helped to devise the dual capacity doctrine, *see Duprey*, 249 P.2d at 8; Bell v. Industrial Vangas Inc., 30 Cal. 3d 268, 637 P.2d 266, 179 Cal. Rptr. 30 (1981), the California Legislature has now closed up this chink in the employer's immunity with legislation enacted in 1982. Only Ohio remains explicitly committed to this doctrine. *See* A. Larson, *supra* note 4, at § 72.83.

There actually was a time when three states—Alabama, Illinois, and Washington—restricted tort suits against any third party that happened to be an employer participating in the state's WC system. The theory behind the policy was that all these members of the same compensation "family" had contributed to the common pool of WC insurance funds from which injured employees (at least those who did not work for self-insured firms) drew their benefits. Although this remains the policy of a number of Canadian provinces (*e.g.*, Ontario), the policy has long since disappeared from WC in the United States. Thus, the increasing propensity of American workers to sue can find ample room for expression in tort actions against third parties.

The major burden of such employee suits is now borne by the manufacturers of vehicles, tools, machines, chemicals, and other products sold to employers for use in their operations. As I noted above, the success of such actions has been greatly facilitated by broader developments in product liability laws: by the adoption in the sixties of strict liability for manufacturing defects which make the product unfit for its intended use, and the enlargement in the seventies of the concept of "defect" to require ever more stringent warnings and design safeguards against misuse of the product.

Another significant source of workplace litigation has been waterfront longshoring. Longshoremen work for stevedoring firms which contract for the loading and unloading of ship cargo. Although longshore employees are covered by the Longshoremen's and Harbor Workers' Compensation Act (LHWCA),[29] they are also entitled to sue a third-party vessel owner if and to the extent that the owner contributes to their injuries. As long ago as 1946, the U.S. Supreme Court greatly facilitated such suits by holding that longshore workers were entitled to rely on the legal theory of the "unseaworthy" vessel originally developed in suits by injured seamen.[30] According to this theory, the vessel owner is strictly liable for any injuries caused by unsafe conditions on its ship, even if the hazard actually was caused by the stevedoring firm and its employees, and even if the injuries actually occurred on dry land. In tandem with its 1972 improvements to the LHWCA benefit system, Congress removed the very stringent legal responsibility of the vessel owner to the longshoreman for the "unseaworthiness" of the vessel,[31] although the law maintained the longshoreman's right to sue for actual "negligence" of the owner.[32] However, both before and after 1972, the readiness of longshore workers to bring such third-party actions for injuries also covered by the LHWCA has required the U.S. Supreme Court regularly to address the same basic question: how to accommodate fault-based tort liability with a no-fault WC-type system.

My concern here is not with the details of product or vessel liability as such, but

29. 33 U.S.C. §§ 901-950 (1982).

30. *See* Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946).

31. *See* Cohen & Dougherty, *The 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act: An Opportunity for Equitable Uniformity in Tripartite Industrial Accident Litigation*, 19 N.Y.L.F. 587, 593–94 (1974).

32. The scope of this remaining shipowner liability was defined with some particularity by the Supreme Court in Scindia Steam Navigation Co., Ltd. v. De Los Santos, 451 U.S. 156 (1980).

rather with the appropriate relationship of such tort litigation to the policy of employer immunity under WC legislation. Two additional features of the employer's situation give a particular edge to this problem.

First, in all but three jurisdictions (Ohio, Georgia, and West Virginia) the employer is given a statutory lien against the employee's tort right to secure reimbursement of WC benefits that the employer has or will pay to the injured worker.[33] Different legal techniques may be used to implement this lien, such as an employer's right of *subrogation* to the worker's own tort action, or an *assignment* to the employer of the right to bring on its own the worker's third-party action. While for convenience's sake I shall refer here only to the device of subrogation, the outcome of a successful third-party action would be the same: the employer is reimbursed for its compensation payments, the employee collects the balance of the tort damages, and the two share the bill for legal services. Thus, from the third-party defendant's viewpoint, the employer (along with its insurance carrier) is often the initiator and is usually a beneficiary and a financier of a tort action apparently brought to enforce the injured worker's rights.

Such a subrogation policy has always seemed reasonable from the WC perspective. As between the employer and the injured employee, the policy insures that the employee will not collect compensation twice and thereby enjoy a financial windfall for a single injury. As between the employer and the third party, subrogation insures that the employer, which must pay guaranteed WC benefits irrespective of any fault on its part, will be the beneficiary of a set-off of the damages paid by a third party under a tort regime historically founded on fault.

However, there are some troubling features to this WC policy from the third-party tort perspective. First, as indicated earlier, the force of the fault principle has been attenuated considerably by recent developments in tort law which no longer require that there be personal blameworthiness on the part of the defendant actor, but rather only some legal fault in the product (defect) or vessel (unseaworthiness). Second, while it is true that employers are liable for payment of WC benefits to their injured employees even absent any employer fault, it is often the case that the employer has been extremely careless in the workplace operation that produced the employee injury and the consequent third-party action.

A good illustration is the oft-cited *Barker* decision of the California Supreme Court,[34] which set forth the legal prerequisites for a product design claim in that state. The case involved an employer who was using a large piece of equipment, purchased from the defendant manufacturer, on extremely unsuitable and hazardous terrain. Indeed, the work appeared so dangerous that the regular machine operator had called in sick to avoid having to perform it. After the employer ordered the plaintiff, the inexperienced Barker, to take the operator's place on the machine, Barker was severely injured. The guidelines laid down by the California Supreme Court assume that a third-party manufacturer can be liable in tort to such an injured employee on

33. *See generally*, A. LARSON, *supra* note 4, at § 74.11 ("subrogation" section).

34. Barker v. Lull Eng'g Co., Inc., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

account of its failure to design safeguards that would protect workers who felt economically compelled to perform such risky assignments using the manufacturer's product. Moreover, because in numerous situations employers have actually removed such protective devices in order to enhance the productivity of the equipment, some courts have gone so far as to hold the manufacturer liable for not making its fail-safe devices absolutely tamper-proof against such unscrupulous behavior.[35]

Nor are these simply a few unusually egregious cases which, for that reason, happen to turn up in the law reports and tort casebooks. A federal study of product liability in the mid-seventies found that employer negligence was present in one-fourth of all product liability suits brought by injured workers.[36] A later survey in California (where the judicial attitude described above was especially pronounced) revealed that employer negligence was present in half of all such employee claims and in two-thirds of the successful third-party actions.[37]

The experience of manufacturers, their liability insurers, and the courts with this increasing pattern of employer involvement in workplace product mishaps clashed with the standard operation of the exclusivity doctrine. Recall that not only was the employer immune from suit by the employee, but also that the employer could, through such a suit against the third party, recover full reimbursement for all WC benefits paid. As a result, in fact situations like the one in *Barker*, the manufacturer of the machine in question might have to pay full tort damages to the injured employee, while the employer would go entirely free of financial responsibility for the accident, under either WC or tort law.

The outcome in the above situation did not square with another tort law trend of the last several decades. Historically, the common law did not permit one tortfeasor against whom a damage award had been levied to secure *contribution* to the award from another tortfeasor who had not been sued. There was a limited possibility of *indemnity*, where the initial but "passively" liable defendant could appeal to some independent contractual or equitable obligation in order to secure full reimbursement for damages paid from the truly "active" negligent cause of the injury. It was not until the fifties that American law began to move away from this limited all-or-nothing approach and to adopt general pro rata sharing of tort damages between legally responsible parties. It was only in the seventies that this sharing was done on the basis of the parties' comparative fault and responsibility.[38] But once the courts

35. *See, e.g.*, Anderson v. Dreis and Kump Mfg. Corp., 48 Wash. App. 432, 739 P.2d 1177 (1987). Other notable decisions imposing on the manufacturer the responsibility to build into its product either interlock mechanisms or a variety of other devices which will guard against any possible human fallibility on the part of the worker or employee include: Hammond v. International Harvestor Co., 691 F.2d 646 (3d Cir. 1982); Reid v. Spadone Mach. Co., 119 N.H. 457, 404 A.2d 1094 (1979); Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 406 A.2d 140 (1979); Bexiga v. Havir Mfg. Corp., 60 N.J. 402, 290 A.2d 281 (1972); Micallef v. Miehle Co., 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976); and Phillips v. Kimwood Mach. Co., 269 Or. 485, 525 P.2d 1033 (1974). For a recent and emphatic effort to draw some line around such protective judicial sentiments (albeit, still over a vigorous dissent), see Robinson v. Reed-Prentice Div. of Package Mach. Co., 49 N.Y.2d 471, 403 N.E.2d 440, 426 N.Y.S.2d 717 (1980).

36. *See* Weisgall, *supra* note 8; Viscusi, *supra* note 8, at 193.

37. *See* L. DARLING-HAMMOND & T. KNEISNER, THE LAW AND ECONOMICS OF WORKERS' COMPENSATION 41 (1980).

38. The California Supreme Court rendered one of the most cited decisions in American Motorcycle Ass'n v.

had worked their way through this problem as it affected all the parties governed by the same tort system, it was only natural that they would consider whether and how to use their newly fashioned techniques to redefine the relationship of the product manufacturer (or other third-party defendant) to the employer, notwithstanding the latter's WC immunity from direct tort suit.

VI. The Instruments and Aims of Personal Injury Policy

This section will describe and appraise in some detail a number of legal techniques for accommodating the competing claims of the employer's WC immunity and the manufacturer's tort liability. First, however, it is necessary to note the underlying values and objectives one might want served by any such policy instrument.

Part of the dilemma in this area stems from the fact that different moral visions underlie the contrasting WC no-fault and tort/fault approaches to disabling injuries. The historic principles of the tort system viewed these cases as a private contest between one person who was careless and another who had been harmed. The judicial task was to correct the resulting unjust tilt in the parties' relationship. From that perspective, it naturally seems morally dubious that WC should insulate an employer from any responsibility for a tort judgment awarded against a manufacturer for an injury that was due in substantial measure to the employer's misconduct.

While in certain respects WC does take account of the reality of careless or deliberately hazardous behavior by either the employer or the employee, the moral foundations of WC rest not on individual rights and corrective justice, but on a pragmatic effort to maximize social welfare and utility. The employer is treated as a conduit through which WC benefits are guaranteed to all injured workers. The funds to pay for this insurance are raised from the stakeholders in the business (as it turns out, primarily from healthy employees through foregone wages and benefits).

The legislative aims in the design of a WC policy can be summarized as follows: First, there should be a benefit structure which gives decent redress to the more immediate and pressing needs of the injured worker, but not at levels which might generate a "moral hazard" in the worker's willingness to expose himself to additional or more protracted on-the-job disabilities. Second, the WC insurance system must give employers the coverage and protection they need against severe financial losses, but generate premium charges reflective of the actuarially credible accident experience (good or bad) of individual firms. Third, the WC administrative procedure must allow the parties an adequate opportunity to assert their claims and make their case, while economizing on the scarce money and time expended in making these decisions.

These same utilitarian social objectives of *sensible compensation*, *effective prevention*, and *economical administration* are now part of the conventional wisdom of present-day tort scholars and judges. But the deeply felt commitment of the tort

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Superior Court, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978). For a current review of these developments, see Woods, *Some Observations on Contribution and Indemnity*, 38 Ark. L. Rev. 44 (1984).

system to individual corrective justice is still readily visible in the reaction of many judges and commentators to what they feel is the highly inequitable immunity of employers in the type of situation addressed in this article. If one sees these suits as contests about the rights and wrongs of individual people, then it will seem dubious, if not outrageous, that the third-party manufacturer should pay the full tort and WC bill in a case like *Barker*, while the irresponsible employer pays absolutely nothing.

In reality, though, almost all of the cases like *Barker* involve a contest between the employer's WC insurance carrier, which paid the no-fault benefits, and the manufacturer's product liability insurer, which paid the tort award. Both carriers are in the business of insuring against such costs, and they can and do collect from their respective pools of insured firms the premiums necessary to pay for whatever allocation of liability the legal system decides upon.

It is true that if there exists an appropriate degree of experience rating in either WC or product liability insurance, the particular employer or manufacturer involved in a case like *Barker* might eventually bear some financial burden as a result of the legal arrangements just described, and might thereby advance the appropriate moral claim for just treatment of its individual rights. But any such party is likely to be a corporate organization of considerable size, especially if it is large enough to warrant experience-rated insurance. The funds used to pay for the firm's standard insurance costs will be contributed by the manufacturer's customers and the employer's workers, and any surcharge for substandard firm performance will come from the pockets of the corporate shareholders. The actual individuals at fault in the design of a defective product or in its misuse in the workplace will pay neither the tort damages nor the insurance premium resulting from any injury, and will rarely suffer any personal consequences in their job or career with the firm.

In reality, then, whether this issue is considered from the perspective of the product liability or the WC constituencies, it simply does not present the kinds of human involvement and claims that have always given such moral force to traditional arguments of corrective justice and personal responsibility. This does not imply that we face no significant and difficult problems here: clearly we do. But the problem is more accurately pictured and more sensibly resolved if it is defined as how best to allocate the legal and financial burden between the product liability and WC insurance systems so as to achieve the best practical blend of compensation, prevention, and administration.

VII. Alternative Relations of Tort Liability and WC Immunity

A. *The Dominance of WC Policy*

A large majority of jurisdictions deny the third-party manufacturer any contribution at all from the negligent employer towards the full tort damages paid to the injured employee.[39] This policy rests on the legal theory that contribution is permitted

39. *See* A. Larson, *supra* note 4, at § 76.20. Among the more recent cases which have rejected judicial adoption of any of the modern refinements to the exclusivity principle are: Diamond Int'l Corp. v. Sullivan and Merritt, Inc.,

only between parties who are jointly *liable* in tort to the plaintiff. Because the employer governed by WC is immune from such liability to its injured workers, it cannot be called upon to contribute any funds to help satisfy the third party's liability to any of its employee victims.

When legal devices are proposed to elude the technical confines of the contribution doctrine there is also a standard policy response. The employer that paid for guaranteed, no-fault WC benefits has been promised, in return, protection from fault-based tort liability. As discussed earlier, this immunity from direct suit by the injured worker and his family has recently been buttressed against, rather than undermined by, a variety of imaginative theories developed by employees and their counsel over the last several decades. It is argued, however, that an even more sweeping loophole in WC immunity would be created if the employee could sue and collect tort damages from a third party for the injury, and if the third party could then simply force the employer to foot a share of the tort award.

As noted above, however, when such denial of employer contribution combines with the subrogation rule, the employee collects full (but no more than full) damages from the third party, while the negligent employer ends up paying no compensation at all under either WC or tort law. This result is regularly condemned as inequitable and unfair, especially since, in many such cases, the employer was seriously at fault whereas the only defect in the manufacturer's performance consisted of its failure to provide sufficient safeguards against the precise kind of employer misuse of its product that contributed to the workplace injury.

Again, cries of moral outrage over the corrective injustice of this result are somewhat misplaced with respect to what is really a financial dispute between two or more corporate entities (an insurer, a manufacturer, and an employer). But how does the problem look when viewed from the more pragmatic perspective of how best to maximize social welfare?

From the point of view of sensible compensation—at least if one accepts the current tort policy of full redress for all the victim's injuries (an assumption questioned below)—the majority position is fully acceptable: the injured employee is entitled to all his tort damages and no more. From the point of view of economic administration, this policy is less costly, because it avoids the need to resolve an often contentious dispute about whether and to what extent the employer was at fault in the accident, thus excluding the employer and its lawyers as potential additional participants in the contest between worker and manufacturer. But the price of such economy in administration is a serious gap in effective prevention because the employer suffers no financial impact from injuries produced by an employee's misuse of any "defective" product. Instead, all the legal incentives are trained on the manufacturer to build costly safeguards into its products in order to avoid the hazards created by the handful of employers who behave as did the one in *Barker*. There may be room for doubt about precisely how effective are the incentives for prevention

493 A.2d 1043 (Me. 1985); Liberty Mutual Ins. Co. v. Westerlind, 374 Mass. 524, 373 N.E.2d 957 (1978); and Schweizer v. Elox Div. of Colt Indus., 70 N.J. 280, 359 A.2d 857 (1976).

developed by our contemporary tort litigation/liability insurance system. But since prevention is at least one—if not the major—justification for having a tort system at all, it seems strange that this objective would be blithely ignored in this important class of injuries.

B. *The Dominance of Tort Policy*

The majority position does not rule out entirely every possible basis upon which a negligent employer might bear the cost of "product" injuries. Employers in these states are permitted to enter into indemnity contracts with respect to third-party liability, although in some jurisdictions, such as Texas and California, such agreements must be explicit and in writing in order to be enforceable. From the point of view of WC policy there is no particular reason why an employer should be prohibited from undertaking such financial responsibility, for which it will presumably receive some consideration, either in cash or in kind.[40]

A more significant inroad upon WC immunity would be produced by the judicial use of a broader doctrine of quasi-contractual indemnity implied by law from the nature of the parties' relationship. This legal doctrine was developed for cases in which one party to the relationship (*e.g.*, a motor vehicle owner) was held legally responsible for its vicarious "passive" involvement in an injury that was primarily due to the "active" fault of the other party (*e.g.*, the driver). A good illustration of the concept is the legal responsibility of the shipowner for injuries produced by the unseaworthy condition of a vessel, which was caused in turn by the negligence of another party that had been using or working on the vessel. A decade after the U.S. Supreme Court held in *Sieracki*[41] that a vessel owner is liable in tort to a longshoreman injured by such an unseaworthy condition, the Court held that a stevedoring firm whose activities make a vessel hazardous to the firm's longshoremen must indemnify the shipowner for tort damages paid to any longshoremen who are thereby injured.[42]

After this theory of quasi-contractual indemnity had received the *imprimatur* of the Supreme Court in *Ryan*, the doctrine was regularly deployed in state courts by third-party defendants seeking financial redress from negligent employers. The theory has, however, significant problems and limitations.

First, the consensual basis of the indemnity obligation is largely fictional. For example, while there was a contractual relation between the shipowner and the stevedore in *Ryan*, nothing in their written contract even hinted at an undertaking by the stevedore to reimburse the shipowner for any tort damages, let alone damages paid to the stevedore's own employees. The Supreme Court actually imputed such an obligation on the part of the stevedore because the Court believed this to be the fair

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40. *See, e.g.*, Espaniola v. Cawdrey Mars Joint Venture, 68 Haw. 171, 707 P.2d 365 (1985) (applying and enforcing an explicit written indemnity clause in a construction contract between a general contractor and the subcontractor/employer of the victim). The Ninth Circuit has interpreted Nevada's WC statute to make even express indemnity agreements unenforceable in that state. *See* Aetna Casualty and Surety Co. v. L.K. Comstock & Co., 684 F.2d 1267 (9th Cir. 1982).

41. Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946).

42. Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp., 350 U.S. 124 (1955).

and sensible thing to do. While the *Ryan* judgment may have been sound, the Court failed even to address the counterarguments of WC policy against imposing on an employer any such financial responsibility, let alone this particular version of such responsibility.

A significant problem was the fact that indemnity traditionally operated on an all-or-nothing basis. That made sense for the situations in which indemnity originated, because typically such situations involved a search for reimbursement by a party that had been held vicariously responsible to the victim for the active negligence of another party. But where both parties had made some significant contribution to the hazard that caused the injury, standard indemnity law (by contrast with contribution law) did not contemplate sharing the financial responsibility between the two, either pro rata or proportionately.

Finally, and most important, the contractual gloss on this fictitious undertaking of quasi-contractual indemnity limited its use to those employer-third-party contexts where the implication of consent would seem plausible: in such relationships as, for example, vessel owner and stevedore,[43] building contractor and subcontractor,[44] or plant owner and cleaning firm.[45] In each of these cases, the employer provides continuing services to the third party under a contract in which one might fairly assume some obligation exists to perform the work carefully and, if it is not so performed, to compensate the other party for the cost of negligent performance. Such compensation would include even the cost of tort damages to the contractor's employees. However, in the crucial product liability context, such an inference does not seem at all possible. One can readily assume that manufacturers have a continuing obligation to warrant the safety and quality of their products; but it is simply implausible to imagine that the purchaser of a product thereby undertakes to use that product carefully and to indemnify the manufacturer if it does not.[46]

In response to these conceptual difficulties, the New York Court of Appeals decided in the early seventies to sweep away these obstacles in the contractual indemnity doctrine by simply creating a new principle of "equitable indemnity."[47] This doctrine was used to require proportional contribution to the tort damages awarded to a deceased worker from both a chemical company that had inadequately labelled its dangerous product, and from the employer that had inadequately

43. This setting produced the decision in *Ryan*, 350 U.S. at 124.

44. *See, e.g., Espaniola*, 707 P.2d at 367–68.

45. This was the relationship in which the Iowa Supreme Court found an indemnity obligation in favor of the plant owner in Blackford v. Sioux City Dressed Pork, Inc., 254 Iowa 845, 118 N.W.2d 559 (1962).

46. Thus, the Florida Supreme Court, which held in Sunspan Eng'g and Constr. Co. v. Spring-Lock Scaffolding Co., 310 So.2d 4 (Fla. 1975), that the state legislature could not preclude constitutionally third-party access to the courts to enforce any right of contribution or indemnity, held that a product manufacturer had no such right under its typical relationship with its customer-employer. Houdaille Indus., Inc. v. Edwards, 374 So.2d 490 (Fla. 1979). *See also*, to the same effect, the decision of the Supreme Court of Iowa in Iowa Power and Light Co. v. Abild Constr. Co., 259 Iowa 314, 144 N.W.2d 303 (1966), rejecting any implication that there was a general right of contribution or indemnity, notwithstanding that court's holding earlier in *Blackford*, 118 N.W.2d at 559.

47. The key case was Dole v. Dow Chem. Co., 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972). This decision, together with Florida's ruling in *Sunspan*, 310 So.2d at 4, in turn evoked a useful analysis of this problem in Davis, *Third-Party Tort Feasors' Rights Where Compensation-Covered Employers are Negligent—Where do* Dole *and* Sunspan *Lead?*, 4 HOFSTRA L. REV. 571 (1976).

instructed and supervised its employee in the use of the product. By the end of the seventies, the courts in other jurisdictions, such as Illinois,[48] were calling this procedure simply *contribution*, and justifying its use by reference to the parties' joint negligence and causation of the worker's injury irrespective of whether joint tort liability existed. But whatever label was used, the legal result was the same: if the employee successfully sued a third party for an injury, the negligent employer had to pay its full proportional share of the tort damages.

How should this alternative position of "equitable indemnity" or "contribution" be appraised? From the perspective of fault-based corrective justice, requiring employer contribution seems ideal. The financial burden of injury is distributed in precise proportion to the moral responsibility of all who caused it. From the point of view of social welfare, this new legal allocation is neutral with respect to compensation because the victim's recovery is unaffected. There is a significant administrative burden in litigating the often contentious issue of employer blameworthiness. However, this burden seems to be a price worth paying in order to impose on employers a financial incentive to avoid the new legal obligation by taking reasonable steps necessary to prevent such injuries from occurring in their workplaces.

However, the entire line of argument underlying the rulings in cases such as *Dole* and *Skinner* assumes the dominance of the tort system and its fault perspective. The contrary vision and policy of WC are entirely ignored.

Tort law awards full compensation for all losses suffered by injured workers, but only in cases in which an accident can be blamed on a faulty actor or product. Now, in New York, the employer must bear its "fair" share of such tort damages if and to the extent that it was at fault. But the tort system turns a blind eye on all the other cases (which comprise the majority of workplace injuries) in which the employer, unlike the manufacturer, has guaranteed WC benefits to employees injured without any employer fault, including the many cases in which the injury was due to the employee's own fault. The assumption of WC is that employers should have substantial financial responsibility for all workplace injuries and thereby a sufficient incentive to invest in precautions that will prevent their occurrence. However, the benefits of such WC insurance are to be redistributed among the injured employees: smaller payments will be made to workers who might have collected more in a valid tort claim against the employer in order that some significant but partial redress be given to the much larger number of injured workers who would have collected nothing under tort law. But now, under *Dole*, the mere fact that a particular employee happens to have a valid tort claim against an outside party is enough to require the employer to shoulder an additional financial burden in compensating the employee.

True, in the early seventies it was commonly and accurately assumed that the level of financial responsibility imposed by state WC systems on employers for workplace injuries to their employees remained far below the appropriate point. This

48. *See* Skinner v. Reed-Prentice Div. of Package Mach. Co., 70 Ill. 2d 1, 374 N.E.2d 437 (1978).

problem justified a general upgrading of the entire WC benefit structure for all workplace injuries, a development which eventually took place in the late seventies and early eighties. The employers' low level of financial responsibility was not a good enough reason, however, for requiring another layer of expensive tort liability insurance to discharge a new employer obligation for the sole category of workplace injuries in which an outside party happened to be involved and legally liable.

C. *Substantive Compromise Between Tort and WC Policy*

There is a possible legal solution that would better mesh the policies of both the WC and tort regimes. The employer should be required to contribute a share of the injured worker's damage award against the third-party manufacturer, but only up to the amount of the employer's financial exposure in WC benefits payable for the injury. In effect, such a limited employer contribution to tort damages would offset what would otherwise be the employer's WC lien against the tort award. Such a revision of tort contribution law tailored for the WC context was first devised by the Pennsylvania courts,[49] although it was later overturned by the state legislature.[50] It has also been adopted by the courts in Minnesota[51] and the legislatures in Kentucky[52] and in Idaho.[53] A simpler legal version of the same policy allows a third party to assert as a defense in a tort suit (brought by either the employee or the employer) the amount of the employer's WC lien against the ultimate award, with a corresponding reduction in the employee's reimbursement obligation. This is the practice in North Carolina[54] and in California.[55]

The positive virtue of such a compromise is that it requires both the employer and the WC program to bear their expected share of the cost of workplace injuries. The employer is not relieved of the specified financial incentive intended by WC to adopt the precautions which can and should avoid such workplace accidents.

One might judge such a compromise to be flawed in this particular respect: because of the typical disparity between WC benefits and tort damages, the third party is likely to pay a disproportionate share of the tort award. Suppose, for example, that a workplace/product injury is caused by the equal fault of both

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49. *See* Maio v. Fatis, 339 Pa. 180, 190, 14 A.2d 105, 110–11 (1940); *see also* Elston v. Industrial Lift Truck Co., 420 Pa. 97, 99–100, 216 A.2d 318, 319 (1966).

50. The Pennsylvania Legislature removed the limited employer contribution created by the Pennsylvania courts in an amendment to the Workmens' Compensation Act in 1974. The Pennsylvania Supreme Court upheld the constitutionality of the legislation in Tsarnas v. Jones & Laughlin Steel Corp., 488 Pa. 513, 412 A.2d 194 (1980).

51. Following the Minnesota Supreme Court's decision in Carlson v. Smogard, 298 Minn. 362, 215 N.W.2d 615 (1974), the court held that total removal of any third-party right of recovery would violate the state and federal constitutions. Lambertson v. Cincinnati Corp., 312 Minn. 114, 257 N.W.2d 679 (1977).

52. *See* KY. REV. STAT. ANN. § 342.690 (Baldwin 1983). The constitutionality of this Kentucky legislation was upheld in Capps v. Herman Schwabe, Inc., 628 F. Supp. 1353 (W.D. Ky. 1986).

53. *See* IDAHO CODE § 72-209(2) (1989). This provision was interpreted and applied in Pocatello Indus. Park Co. v. Steel West, Inc., 101 Idaho 783, 621 P.2d 399 (1980).

54. This practice dates back to 1933 in North Carolina. *See* Brown v. Southern Ry. Co., 204 N.C. 668, 169 S.E. 419 (1933).

55. *See* Associated Constr. & Eng'g Co. v. Workers' Comp. Appeals Bd., 22 Cal. 3d 829, 587 P.2d 684, 150 Cal. Rptr. 888 (1978) (modifying the earlier pro rata version of this defense from Witt v. Jackson, 57 Cal. 2d 57, 366 P.2d 641, 17 Cal. Rptr. 369 (1961), in light of the court's subsequent adoption of comparative apportionment as between joint tortfeasors in American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978)).

employer and manufacturer and is assessed at $100,000 in tort damages but only $25,000 in WC benefits. In Illinois and New York, the employer would contribute $50,000 to the tort award, but in Minnesota and California, the employer would pay no more than $25,000. Of course, the reason why the employer pays only $25,000 in these states is that it also pays for insurance against numerous employee injuries which are not due to any party's fault and which carry no prospect of tort recovery. But the product manufacturer would still argue that its appropriate burden for this accident, calculated at $50,000 under standard tort principles, should not be increased simply by reason of the employer's responsibility for other accidents and injuries.

The conventional response of tort law to the manufacturer's argument is that, as between the innocent victim and the culpable manufacturer, the latter should be responsible for the full $75,000 balance of the award, just as it would be if the other jointly responsible party happened to be financially insolvent rather than legally immune. However, when one reintroduces WC into the picture, this time from the perspective of the employee, such an easy answer seems less convincing.

Some courts, most prominently the D.C. Circuit[56] and the Fourth Circuit,[57] have argued that the manufacturer should be required to pay only its own rightful share of the award ($50,000 in the above example), with the WC benefit paid by the employer deemed to be full satisfaction of the employer's otherwise appropriate share of the victim's tort judgment. While it is true that, from an *ex post* viewpoint, this rule leaves the particular employee without full tort compensation for all losses which he happened to suffer from the injury, from a broader *ex ante* perspective, this tort claimant as well as his fellow employees are able to draw on WC insurance for the much greater number of workplace injuries for which tort recovery was not possible. As mentioned previously, WC benefits are smaller than tort damages in particular cases so that they may be spread across the broader pool of all injured workers. It is not unfair, therefore, to apply the same WC principle of limited but guaranteed compensation so as to reduce somewhat the size of an employee's tort recovery in a case which happens to intersect in this way with the WC system.

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56. *See* Murray v. United States, 405 F.2d 1361, 1361–66 (D.C. Cir. 1968). The division of responsibility proposed in this case, between the third-party suit under the tort system and the negligent employer paying benefits under the WC system, was to be pro rata—half and half between each party irrespective of their varying degrees of comparative fault.

57. *See* Edmonds v. Compagnie Générale Transatlantique, 558 F.2d 186 (4th Cir. 1977). The approach proposed by this court for tort claims by longshoremen against the third-party shipowner would have apportioned the latter's responsibility for the total damages in accordance with its level of culpability relative to that of the stevedore-employer. That particular proposal had been made by Cohen & Dougherty, *supra* note 31, at 605–07, for these longshoring cases under the LHWCA, and by Davis, *supra* note 47, at 587–91, for workplace injuries generally. However, the Fourth Circuit ruling in *Edmonds* was reversed on appeal by the Supreme Court, *see* 443 U.S. 256 (1978), on the grounds that the 1972 LHWCA amendments, which eliminated any direct reimbursement rights by the vessel owner against the stevedore, also precluded any such judicially fashioned limits on full recovery by the longshoreman against a negligent shipowner. But the Supreme Court's analysis of this issue in the specific context of longshoring injuries governed by Congress' actions in 1972 does not inevitably require such a conclusion for other federal contexts where third-party rights of contribution or indemnity are permitted—under the Federal Employees' Compensation Act (FECA) in particular. *See* Lockheed Aircraft Corp. v. United States, 460 U.S. 190 (1982); Weyerhaeuser Steamship Co. v. United States, 372 U.S. 597, 600 (1962).

D. *Administrative Adjustment Between the Two Systems*

Whatever the substantive virtues of either of the above methods of blending tort and WC policy, they share the major administrative failing of multiplying the incidence of claims, litigation, and transaction costs.

In Minnesota, for example, a worker must first bring a WC claim against his employer and then bring a tort claim against the third-party manufacturer. A contribution claim will then be lodged by the manufacturer against the employer. Finally, the employer brings a subrogation claim against the injured worker's tort award. All these steps are taken in order to cycle compensation dollars from the pockets of one party into those of another. Some of these legal relations and proceedings are avoided in the simpler California version of a manufacturer defense against the victim's tort action to the extent of the employer's fault, with a corresponding reduction in the employer's subrogation claim against the employee. Even so, the California law introduces the additional and always contentious issue of employer fault into what might otherwise have been a more direct contest between the employee and the manufacturer over the safety of the product. Moreover, serious complications arise in trying to work out an appropriate reduction and set-off whenever there is a compromise settlement—perhaps for only partial damages—of such a tort claim.[58]

The consequence of this multiplication of legal proceedings is that much insurance money (generated under either WC or product liability), which might otherwise be available to address the needs of injured workers, is spent on lawyers fighting the collateral battle over which party will pay precisely how much of the bill. It is doubtful that any potential gains in the precise effectiveness and fairness of personal injury programs are worth the enormous administrative burden required for such an effort.

Achieving an administratively wieldy solution does not require a retreat to the administrative economy of pure WC immunity for the employer. Another approach to the problem is contained in the proposed Uniform Product Liability Act and regularly appears in proposals for product liability reform.[59] The WC legislation would be altered by eliminating any subrogation right of the employer against the injured worker's tort award. At the same time, product liability law would be altered by reducing the size of tort damages by the amount of WC benefits paid or payable to the employee.[60]

Note that this proposal does involve significant alteration of the substantive outcomes discussed earlier. The manufacturer's tort liability would be reduced only

58. See the description of the convoluted calculations required by *Associated Constr.*, 587 P.2d at 684, in Emmer, *Workers' Compensation—California Comparative Negligence in Industrial Accident Cases—A Historical and Practical Approach*, 7 WHITTIER L. REV. 327, 342–47 (1985).

59. *See* Department of Commerce, *Model Uniform Product Liability Act*, § 114(A), 44 Fed. Reg. 62,714, 62,740–41 (1979) [hereinafter *Model Act*]. For works by scholarly proponents of this solution, see Epstein, *Coordination of Workers' Compensation Benefits With Tort Damage Awards*, 13 FORUM 464 (1977); Larson, *Third-Party Action Over Against Workers' Compensation Employer*, 1982 DUKE L.J. 483, 540–41 (1982).

60. *See Model Act*, *supra* note 59, at § 114(C).

by the actual WC benefits paid by the employer, rather than by some appropriate measure of the culpable employer's share of the larger tort award. More importantly, all employers, not only culpable employers, would lose their subrogation rights against the worker's tort award. These are the implications of the law's effort to exclude not only the contentious issue of employer fault, but also the very presence of the employer from the tort contest between injured worker and third-party manufacturer.

From the victim's point of view, the adequacy of compensation paid would not be affected by this readjustment of the payment responsibilities of employer and manufacturer. Moreover, if one believes that both tort and WC provide a rather crude monetary motive for enterprise investment in injury prevention, this fine tuning of the law with respect to who pays how much for which injuries is unlikely to detract materially from the remaining legal and financial incentives felt by firms to reduce workplace/product injuries where reducing such injuries seems feasible.

The aim and the likely result of this proposal is to shift a somewhat greater share of the liability burden from the manufacturer to the employer. Not only is this shift a sensible corrective to the broader trends in product liability and WC awards over the last two decades, but it also funnels a higher share of the payments to injured employees through the considerably cheaper mechanisms of insurance and administration within WC, rather than through the increasingly expensive tort litigation/liability insurance system. And while individual blameless employers will grumble about losing their right to recoup some of their WC payments through subrogation claims against manufacturers of defective products, the fact is that the manufacturers incorporate rising costs of insurance and legal fees into the prices charged for the products sold to their customers. Their customers are these same employers.

E. *Eliminating the Third-Party Product Liability Suit*

If one assumes that the no-fault WC and tort/fault product liability systems will continue to coexist for workplace injuries, the proposal mentioned in the previous discussion does seem to be the most sensible way of meshing the operation of the two programs. But once we set out to reduce the administrative burden of third-party suits by eliminating the battle between employer and manufacturer over subrogation and contribution, it becomes apparent that this burden is only a secondary, albeit significant, dimension of the problem. The major insurance and litigation costs stem from the right of the injured worker to sue the manufacturer in tort as well as to recover WC benefits from the employer. Thus, one should at least consider whether to eliminate entirely this tort right. Unquestionably, such a change would be an extremely controversial proposal, although it was seriously entertained a decade ago by the federal Task Force on Product Liability.[61] What are the arguments supporting

61. *See* INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, U.S. DEPARTMENT OF COMMERCE, FINAL REPORT, VII-112 (1979) (available from the National Technical Information Service, Springfield, Virginia 22161). This was also the position advocated by *Bernstein*, *supra* note 8, in his analysis of this issue prepared under the auspices of the U.S. Department of Labor Interagency Task Force on Workers' Compensation.

and opposing this idea, and what light might these arguments cast on the general debate about tort reform and retrenchment?

An initial and simple argument for such a proposal is related to a recurring theme of this article. Employers who guarantee and pay for broad-based WC benefits for all their injured employees rightfully can claim relief against the cost of tort liability for accidents caused by the firms themselves, or by any of their associates for whose liability insurance the employers will ultimately have to foot the bill.

As discussed earlier, the argument in favor of third-party tort suits is that because these third parties have played no role in providing WC benefits, they can claim no relief against possible tort action. This rationale clearly applies to situations in which the third party is a complete stranger to the workplace, such as when the careless driver of a motor vehicle strikes and injures an employee who is on the job. But the product manufacturer is certainly not a stranger to the enterprise. Its machines, equipment, and supplies are purchased by the employer for use in its operations. Any standardized risk of third-party tort suits for workplace injuries attributed to such products will be incorporated into the price that must ultimately be paid by the employer-purchaser. Thus, an initial argument for eliminating the employee's third-party suit, at least against the product manufacturer, is that the employer is entitled to have the legal umbrella of its own WC exclusivity protection also shelter its product suppliers. This exclusivity now extends to the employer's executives and insurance carriers as other parties whose financial risk from workplace tort actions would ultimately have to be covered by the employer.

Suppose one goes beyond this conventional rationale for the employer's WC immunity and considers the issue afresh from the point of view of public policy toward positive personal injuries. After all, neither the manufacturer, its liability insurer, nor the employer ultimately bears the burden of such tort suits. In the final analysis, both WC and tort law are compensation systems through which the community makes available to those who have been injured some share of the goods and services that its economy has been able to produce.[62] From the point of view of compensation policy, stacking tort suits on top of WC benefits engenders serious flaws.

First, while most injured employees are able to collect only limited WC benefits, a comparative handful of those "fortunate" enough to be able to connect their injury to a provably defective product are able to collect a much larger tort payment for the same injury. Not only is this pattern of compensation highly inequitable as between one category of injured worker and another (bearing in mind that many of those barred from tort action might themselves have been able to demonstrate the contributory fault of the employer or of a co-employee), but the process is also extremely costly. Product litigation and liability insurance are probably our most

62. Indeed, labor market analysis demonstrates that the higher cost of increased WC benefits for injured workers correspondingly reduces the wages and benefits paid by these employers to their healthy workers. *See, e.g.*, K. VISCUSI & M. MOORE, COMPENSATION MECHANISMS FOR JOB RISKS: WAGES, WORKERS' COMPENSATION, AND PRODUCT LIABILITY 73–77 (1989); Viscusi & Moore, *Workers' Compensation: Wage Effects, Benefit Inadequacies, and the Value of Health Losses*, 69 REV. ECON. & STATISTICS 249 (1987).

expensive modes of injury compensation, consuming between two and three dollars in social resources to deliver a single dollar into the hands of an injured victim.[63] When one abstracts from the comparable cost of raising and investing the pool of insurance funds, the administration and litigation expenditures of product liability consume more than three times the share of the claims dollar than do WC benefits.[64] The third-party tort action, therefore, is as wasteful as it is inequitable as a mode of compensating injured victims.

Even conceding *arguendo* these deficiencies, defenders of the employee's third-party tort right justifiably point out that this process still puts substantial sums of money in the hands of, for example, workers disabled by machine tool accidents or toxic exposure to asbestos: people who otherwise would be condemned to subsistence-level WC benefits. While the notoriously ungenerous image of WC two decades ago is generally no longer warranted in light of the upgrading of benefits since the mid-seventies, the WC benefit structure still suffers from a major flaw in its treatment of the most serious workplace injuries.[65] The WC pension paid to permanently disabled workers or surviving dependents of fatally injured workers is not regularly adjusted for inflation. After a certain period of time, therefore, the WC pension simply becomes inadequate to live on. From this perspective, tort litigation, for all its waste and inequity in operation, is an available method of channeling additional resources toward at least some of those injured workers who are least well served by WC.

The appropriate response to this argument is that any cutback on the right of injured workers to sue for tort damages should occur only in tandem with significant additional improvements in WC benefits for the seriously disabled. The 1972 Congressional amendments to the LHWCA referred to above adopted this response. In these amendments, Congress eliminated the longshore worker's *Sieracki* right to sue a shipowner for the unseaworthiness of a vessel (while still permitting a limited right to sue for the shipowner's actual negligence) as the *quid pro quo* for eliminating the shipowner's *Ryan* right to sue the stevedore-employer for indemnity for any tort damages paid to the longshoreman. But at the same time, the LHWCA benefit structure financed by stevedores for their longshoring employees was substantially improved—most notably by indexing all pensions to inflation and by raising the statutory ceiling to a point which covered essentially all the longshoremen's earnings. Thus, if one were to follow the LHWCA lead and cut back even more broadly on the worker's right to sue manufacturers and other third parties, one must do so in tandem with a comparable upgrading of the state WC system.

Two related objections can be raised even to this type of package proposal. First, few employer/employee/third party relations are characterized by the close web of

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63. *See generally* J. KAKALIK & N. PACE, COST AND COMPENSATION PAID IN TORT LITIGATION (1986); P. Weiler, *supra* note 4, at 127–30 (providing a specific comparison of the claims administration and litigation costs of WC and medical malpractice liability, finding that the latter is no more and probably slightly less expensive than product liability (depending on the particular product line being sued)).

64. *See* P. Weiler, *supra* note 4, at 127–30.

65. *See id.* at 45–47.

economic ties which exists among shipowner, stevedore, and longshore worker, enabling adjustments in liability and insurance costs at one point to be readily matched by comparable adjustments at other points. Although almost all WC programs are established on a statewide basis, the major workplace product lines are usually sold (and insured) in national markets. Thus, it would be far more difficult to arrange an LHWCA-like tradeoff of reduced third-party tort litigation and improved WC benefits without creating identifiable financial winners (the manufacturers) and losers (the employers).

While this federalism problem poses a significant political obstacle to such a reform (and might well be surmountable only by legislative action in Washington), the merits of the argument are not particularly compelling. There is nothing sacrosanct about the current allocation between employer and manufacturer of the total cost of compensating workplace injuries (an allocation which has in fact changed markedly from what it was a quarter-century ago). If the WC benefit structure is inadequate at certain key points, and if third-party tort litigation has real flaws as a supplement to WC (and I argue that both of these judgments are supportable), then the public interest requires that we make the appropriate reallocation of responsibility within our set of personal injury programs. Such reallocation should be made even though it would relieve a few manufacturers of a substantial amount of liability costs, while requiring modest increases in the WC premiums paid by employers generally.

The preceding discussion, however, merely casts in bolder relief the major underlying objection to the whole proposal: that elimination of the third-party suit would remove a necessary spur for the design, manufacture, and marketing of safer products. The primary argument for tort liability in any context, including product-caused workplace injuries, is not that the tort system is a particularly sensible and economical mode of compensating injuries that have already occurred, but rather that the prospect of tort liability helps prevent the even more inequitable and wasteful occurrence of workplace injuries that might have been avoided by incorporating more precautions into the product.

As is true generally of this line of defense of tort litigation, there is a paucity of empirical evidence with respect to the net preventive effect of third-party suits on occupational injuries. It is nevertheless plausible that tort liability has at least some impact given, at a minimum, an appropriately designed liability insurance component of the system (which is by no means guaranteed). Given the plausibility of the prevention argument and the lack of demonstrable proof to the contrary, the deterrent effect of civil litigation remains the most politically potent plank in the pro-tort campaign.

Nevertheless, one must not assume that even total removal of the worker's right to sue for product-caused injuries would come even close to eliminating the financial incentives felt by manufacturers to make safer products. Manufacturers sell many of these products, such as motor vehicles, for use in non-workplace contexts, where the threat of tort suits as a prod to greater safety would still remain. Even for products such as machine tools, which are used only in the workplace, society is able to deploy the safety incentives generated by administrative regulation (by OSHA, for example)

or by market forces. It is already clear that employers must pay substantial premiums for the WC benefits of their injured workers, and even larger sums as compensating wage differentials necessary to attract employees into riskier jobs. Workplace machinery causes many of these injuries and the extra WC premiums and wage costs they induce. Thus, employers have an incentive to purchase, and manufacturers a corresponding incentive to supply, machines that can be made safer without unduly detracting from their use or increasing their cost. Although the implicit "calculus of risk" engaged in by the firm balancing these two markets for employee wages and product prices is not as immediate and dramatic as the morality play of the tort suit, the marketplace is and would still be an effective instrument for product safety even without the assistance of tort litigation.

Assuming, however, that most people would be reluctant to relinquish entirely their tort security blanket, there are intermediate options to consider between the poles of full tort rights and no tort rights (as the LHWCA example itself displayed). Thus, one could imagine elimination of the tort suit for workplace accidents but not for industrial diseases or for product designs and warnings that complied with administrative regulations. One particular option merits discussion here. As part of a package of substantial improvements in WC benefits, the employee's tort suit against the product manufacturer would be eliminated. However, the employer would be given a waivable right to sue the third party for recovery of any WC benefits paid or payable to its injured employees.[66]

The above proposal is responsive to a number of concerns about tort abolition, pure and simple. First, the additional money used to compensate injured workers and their families would be raised and disbursed primarily through the cheaper WC no-fault program, rather than through tort/fault litigation. But we would still assure ourselves that manufacturers were visibly contributing something to the financing of the more generous WC benefits. The manufacturers' contribution in cases of defective products, although less than the usual tort award, would be set at an amount that the WC system deemed adequate to induce employer responsibility for a safe workplace. At the same time, the administrative burden of employer claims against the manufacturer would likely be much lower than is typical of suits by seriously injured victims. Less would ride on any such claim. The parties who are often in a continuing business relationship with each other, as either manufacturer to employer or as product liability insurer to WC insurer, would, therefore, be likely to make more extensive use of informal means of dispute resolution, and would often likely agree to contractual waivers of any claim by the employer in return for some adjustment in the purchase price or other terms of sale of the product.[67]

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66. *See* O'Connell, *An Immediate Solution to Some Products Liability Problems: Workers' Compensation as a Sole Remedy for Employees, With an Employer Remedy Against Third-Parties*, 1976 INS. L.J. 683 (1976).

67. There is a final possible approach to this problem. Rather than, in effect, extend the employers' WC immunity to protect the product manufacturer from employee tort suits (as a possible lever for securing improved WC benefits for all injured workers), one should instead bring back the right of the individual employee to sue the employer as well; at least whenever the employer has been at fault in the occurrence of the workplace injury. For a sustained and thought-provoking argument along these lines, see Haas, *On Reintegrating Workers' Compensation and Employers' Liability*, 21 GA. L. REV. 843 (1987). Based upon his assumption that the structure and level of WC benefits will remain

VIII. The Lesson From the Workplace/Product Experience

Stepping back from this detailed description and appraisal of the WC/product liability experience, what key lessons can be drawn for the field of personal injuries generally? After all, WC may be the best known, but it is not the only no-fault program to compensate a particular category of disabling injuries. Equally substantial claims, benefits, and costs are produced by the long-standing program of veterans' benefits paid for service-related injuries.[68] There is also some recent interest in and experimentation with no-fault schemes for medical accidents. The existence of guaranteed veterans' benefits has posed, and the possible development of medical accident compensation will pose, essentially the same problem of how to integrate an administrative no-fault program into the broader tort-fault regime developed and run by the courts.

The initial challenge is whether such a program should incorporate any principle of exclusivity: should the party that guarantees limited no-fault benefits be in turn granted immunity from tort suits for injuries covered by that benefit scheme? Certainly, the standard response to this question by American (and most foreign) legal systems is affirmative. Indeed, the long-standing presence of exclusivity in WC had a persuasive influence on the U.S. Supreme Court when, in *Feres v. United States*,[69] the Court developed a comparable immunity doctrine for the United States government which immunized the government from any liability for "injuries to servicemen when the injuries arise out of or are in the course of activity incident to [military] service."[70] One important reason for the judicial creation of such immunity was that the federal government had already established a readily accessible and relatively generous (certainly at that time) program of veterans' benefits to compensate precisely the same service injuries.[71]

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essentially the same as it is now (and inadequate in the key respects previously discussed), Haas proposes that the employee should be able to sue the employer if damages exceed a minimum threshold *above* the WC benefits payable for the injury. *Id.* It is not possible to address Haas' fundamentally different perspective within the confines of this article. Such a discussion requires an extended analysis both of the respective merits of fault and no-fault liability and of the virtues of compensating pain and suffering with substantial monetary damages (the latter being the most important difference in the benefits payable under these two systems). For a characteristically trenchant criticism of the recent and limited judicial incursions upon the protection won by employers against tort suits under the historical WC "bargain," see Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law*, 16 Ga. L. Rev. 775, 808–19 (1982).

68. See the figures presented in O'Connell & Barker, *supra* note 1, at 924, on the costs of WC ($18 billion) and veterans' benefits ($19 billion).

69. 340 U.S. 135 (1950).

70. *Id.* at 146.

71. Unquestionably, the availability of veterans' benefits was a major factor in the original *Feres* decision (along with a concern about lack of federal uniformity in such suits). *See id.* at 144–46. Later decisions have muddied this connection somewhat. Thus, when the court wanted to allow a veteran to recover in tort for the aggravation of a service injury by treatment in the Veterans' Administration Hospital after he had left the service, the court had to reinterpret *Feres* as based primarily upon a judicial concern about a threat to military discipline from court suits between active servicemen and their superior officers. This reinterpretation was necessary because the injuries that produced the tort suits in Brooks v. United States, 337 U.S. 49 (1949) (which itself had allowed recovery for injuries inflicted on a serviceman while on furlough), and United States v. Brown, 348 U.S. 110 (1954), were also compensable under the Veterans' Benefits Act. The Court used the same military discipline rationale to refuse to extend *Feres* to what might have been considered an analogous problem: tort suits against the federal government by federal prisoners for negligently caused injuries which were also covered by a substantial governmental compensation system. *See* United States v. Muniz, 374 U.S. 150 (1962).

More recently, however, the Court has returned to the fact that veterans' benefits are available as a reason for refusing

But such an inference is by no means inevitable. For example, workers in the United Kingdom who can collect no-fault benefits for industrial injuries still retain the right to sue their employer in tort, as do patients in Sweden, who can draw on a no-fault benefit for medical accidents. Tort litigation has been preserved in these countries as an instrument for policing the workplace or the hospital and thus exposing to view instances of substandard care and hazardous practice.

There are two reasons why retention of the right to sue was an easier judgment to make in the United Kingdom and Sweden. First, generous social insurance benefits were available to all citizens to reduce the cost to the employer or the hospital of this specialized no-fault insurance. Second, comparatively restrained tort liability and damage awards keep down the cost of liability insurance. Precisely the opposite patterns now obtain in the United States. Indeed, much of the political motivation and policy justification for the introduction of no-fault schemes in the medical area, for example, arise from the desire to reduce liability costs to health care providers while ensuring adequate compensation to patient-victims. Thus, it is hardly likely that one could expect hospitals, no more than employers or the United States armed forces, to shoulder an additional no-fault burden for people injured while under their care without granting the hospital broad-ranging relief from exposure to tort litigation.

How broad should such relief be? As is now generally the case under WC, not only must the immediate institution, such as the hospital or the HMO, be granted legal immunity, but so also must its employees and even its theoretically "independent" contractor-physicians, who practice within the hospital precinct.[72] While one would likely want to preserve the possibility of tort suits for intentional wrongs or dignitary harms, such as for lack of informed consent to medical experimentation or for sexual exploitation of patients by psychiatrists, care must be taken in the definition of such exceptions to insure that the institution is not indirectly saddled with vicarious liability for physical injuries for which it already provides no-fault benefits.

Should the tort immunity of the doctor and the hospital also shelter manufacturers and suppliers of equipment, drugs, blood, and other products used in the delivery of medical services? The practical significance of this question is illustrated by the fact that such recent tort *causes célèbres* as DES, Bendectin, and the Sabin polio vaccine all involved drugs prescribed or administered by doctors.[73] Although no

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to allow tort suits for service-related injuries caused by civilian employees of the government, *see* United States v. Johnson, 481 U.S. 681 (1987) (the negligent employees worked for the F.A.A.), and for refusing to allow a third-party manufacturer that has been sued by the soldier to cross-claim for indemnity against the government, *see* Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666 (1976). In *Stencel Aero*, the Court said that *Feres* dictated that "the military compensation scheme provides an upper limit of liability for the government as to service-connected injuries." *Id.* at 673.

Note, however, that the absence of a clear-cut, consensus rationale for *Feres* has left the entire governmental immunity doctrine in some real danger. In *Johnson*, four members of the Court subscribed to a dissent authored by Justice Scalia which vigorously disagreed with the initial adoption of any such governmental immunity and stated that these four Justices certainly would extend *Feres* no farther than necessary. *Johnson*, 481 U.S. at 692 (Scalia, J., dissenting).

72. The Supreme Court has extended the *Feres* principle to protect both the soldier's superior officers, *see* Chappell v. Wallace, 462 U.S. 296 (1983), and civilian employees, *see* United States v. Stanley, 43 U.S. 669 (1987), against even a *Bivens* tort action for the intentional violation of the soldier's constitutional rights.

73. An interesting further variant on the third-party problem that is specific to the medical area is the growth of a plethora of "managed care" programs recently adopted by public and private health care insurers for purposes of cost

present day WC law extends the employer's legal umbrella in such a manner, lawmakers are under a great illusion if they suppose that this insulates the employer, let alone the broader community, from the economic burden of such a duplicative system of tort recovery by employees for the same injuries. Only last year, the U.S. Supreme Court established a wide-ranging government contractor defense against state tort liability in a suit brought for the death of a Marine pilot due to a defectively designed helicopter for which the government had established the specifications.[74] Whatever the merits of this new doctrine in this particular context, if a no-fault program is established for a particular class of injuries, there are strong policy arguments for eliminating at least product liability suits for the same injuries. But, whatever its policy advantages, to include such broad tort immunity in, for example, no-fault patient compensation would likely stop the latter idea right in its tracks. Thus, the question that again surfaces is, what is the appropriate mode of peaceful coexistence between these two contrasting legal regimes?

The standard response in most of the states, which effectively insulate even the egregiously culpable employer from any responsibility through a combination of employer subrogation for WC benefits and immunity from any contribution to the third party's tort liability, makes little sense. Of the several alternative relationships between tort-fault and administrative no-fault, the most attractive is the version contained in the proposed Uniform Product Liability Act. The no-fault benefit paid to the victim should be set off against the tort damages paid by the third party, and there should be no right of subrogation or contribution going in either direction against the net tort award.[75] Although this legal accommodation may fit rather crudely with the economist's depiction of the ideal incentive structure, the final lesson from the WC experience is that we must be content with only a reasonable level of prevention flowing from our liability regimes, or else face an undue burden on both the compensation and the administrative aims of our overall personal injury program.

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containment. Although it found no such occurrence in the specific case before it, a California appeals court made the widely-noted and controversial observation that if the third-party insurer unreasonably and arbitrarily causes medically inappropriate decisions to be made in the case of a patient, the insurer would be liable in tort for the resulting harm suffered by the patient. *See* Wickline v. California, 183 Cal. App. 3d 1175, 228 Cal. Rptr. 661 (1986); Blum, *An Analysis of Legal Liability in Health Care Utilization Review and Case Management*, 26 HOUS. L. REV. 191 (1989).

74. *See* Boyle v. United Technologies Corp., 108 S. Ct. 2510 (1988). Again, the Court was concerned that the financial costs of any such liability of the third-party contractor to the injured soldier would eventually be passed through to the government itself in higher prices under its defense contracts. *Id.* at 2518. The Court, however, did reject the explicit reliance by the lower courts upon the *Feres* principle and the availability of veterans' benefits to justify this new federal common law immunity for defense contractors. *Id.* at 2517. The reason was that the Court wanted both to extend that immunity to suits brought by non-military victims and to limit its use to cases in which the government had exercised some discretion in specifying the design of its purchases. *Id.* at 2517–18.

75. That is also the arrangement developed by the Supreme Court in the evolution of the *Feres* doctrine. Under *Stencel*, 431 U.S. at 666, the third-party manufacturer sued by an injured serviceman has no right of indemnity against the United States, but under *Brown*, 348 U.S. at 111, the amount of tort damages awarded against the manufacturer is reduced by the amount of veterans' benefits payable by the government, with the latter retaining no subrogation rights against the award.